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No. 95-2024

In the Supreme Court of the United States

OCTOBER TERM, 1995

C. MARTIN LAWYER, APPELLANT

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Whether the district court correctly concluded that the plan for redistricting the Florida Senate does not violate the Equal Protection Clause.

2. Whether the district court's use of mediation to assist in the settlement process violated separation of powers or federalism principles.

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Pursuant to Rule 18.6 of the Rules of this Court, the Acting Solicitor General, on behalf of the United States, moves that the judgment of the district court be affirmed.

OPINION BELOW

The opinion of the district court (J.S. App. 3a-20a) is unreported.

JURISDICTION

The judgment of the district court was entered on March 19, 1996. A notice of appeal (J.S. App. 1a-2a) was filed on April 16, 1996, and the appeal was docketed on June 17, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

STATEMENT

1. In 1992, the Florida legislature adopted a redistricting plan for the Florida Senate. The Attorney General objected to the plan under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, based on concerns about the districts in the Hillsborough County area. See *Johnson* v. *De Grandy*, 114 S. Ct. 2647, 2652 n.2 (1994). In response, the Supreme Court of Florida revised the Hillsborough County districts. *Ibid.* One of the revised districts is Senate District 21.

Appellant Lawyer and others sued the State of Florida and the United States Department of Justice, alleging that District 21 was a racial gerrymander that violated the Equal Protection Clause of the Fourteenth Amendment. J.S. App. 3a. The complaint alleged that District 21 "was drawn in an irregular fashion" to create a majority-minority district and "to encompass members of minority groups with divergent interests residing in several different communities." *Id.* at 4a. Blacks comprised 50.2% of the population of District 21 in Plan 330, and 45% of the voting age population (VAP). Response by United States to Plaintiffs' Motion for Summary Judgment (U.S. Response), Exh. 3, Plan 330, at 4.

A three-judge district court was convened. The court permitted intervention by the Florida Senate, Florida's Secretary of State, the incumbent representative of District 21, and black and Hispanic individuals with an interest in District 21. J.S. App. 3a. Florida's House of Representatives appeared as amicus curiae. *Id.* at 4a. The district court held the case pending this Court's decisions in *Miller* v. *Johnson*,

115 S. Ct. 2475 (1995), and *United States* v. *Hays*, 115 S. Ct. 2431 (1995). J.S. App. 4a-5a.

2. After *Miller* and *Hays* were decided, the state defendants informed the district court that the Florida legislature was unlikely to convene a special session to redraw District 21. J.S. App. 5a. The counsel for the state Senate urged the court to consider mediation, and the court concluded that "mediation offered a preferable and feasible alternative to the uncomfortable intervention inherent in federal judicial resolution of issues affecting state government." *Ibid.*

Mediation resulted in an apparent agreement among the parties. J.S. App. 5a. At a hearing held by the district court to consider the agreement, however, the House and appellant objected to it. *Id.* at 5a n.1. The court asked the House to intervene as a party and returned the case to the mediator to see if an agreement could be reached among all parties. *Ibid.* After further negotiations, all the parties except appellant agreed on a plan (Plan 386) with a new District 21. Blacks constitute 36.2% of the VAP and 41.2% of the total population in new District 21. Notice of Filing Declarations and Affidavits in Support of Settlement Agreement of November 2, 1995 (Notice of Filing), Decl. of John Guthrie (Guthrie Decl. II) at Tab 2.

Another hearing was held, and the House, the Senate, the state Attorney General, the Secretary of State, and all other parties except appellant "manifested both the authority to consent and actual consent to the proposed resolution." J.S. App. 6a; Nov. 2, 1995 Tr. (Tr.) 23-25. All parties, including appellant, agreed that the only remaining issue was whether Plan 386 was an appropriate remedy for the

alleged constitutional violation. J.S. App. 6a. The district court set a hearing to consider that issue. *Id.* at 6a-7a. Notice of the hearing was published in 11 area newspapers, and the details of Plan 386 were published and made available for review in the district court clerk's office. *Id.* at 15a; Proof of Publication re: Fairness Hearing. Before the hearing occurred, the Department of Justice precleared Plan 386 under Section 5. Joint Motion to Approve Settlement, Attachment B.

3. At the hearing, the parties supporting Plan 386 submitted evidence that it was consistent with Florida's traditional redistricting principles and that those principles had not been subordinated to race. Florida law requires equality of district populations, and the evidence shows that Plan 386 satisfies that requirement. Notice of Filing, Guthrie Decl. II, at 5. Plan 386 also satisfies the Florida law requirement that districts include contiguous territory. Although District 21 crosses Tampa Bay, the Florida Supreme Court has held that districts that cross bodies of water comply with Florida's contiguous territory requirement. Fla. Const. Art. III, § 16 (1968); Notice of Filing, Guthrie Decl. II, at 5-6; *In re Constitutionality of Senate Joint Resolution 2G*, 597 So.2d 276, 279 (Fla. 1992).

The parties also introduced evidence that proposed District 21 complies with the State's traditional practice of drawing district lines in order to encompass communities of interest. U.S. Response, Exh. 10, Decl. of Richard K. Scher at 2, 13-14, 16. District 21 is predominantly urban and poor and unites black and white residents of low socio-economic status. Notice of Filing, Guthrie Decl. II, at 8-10. More than 95% of proposed District 21's residents live inside an

urban area, and the district would rank among the poorest of the State's 40 districts. *Ibid.* The residents of proposed District 21 also share many interests relevant to representation in the Florida Senate, such as concerns about crime, the AIDS crisis, water resource management, and regional economic development. U.S. Response, Exh. 15, Decl. of Richard J. McHugh; U.S. Response, Exh. 10, Decl. of Richard K. Scher at 28-31; Notice of Filing, Decl. of Charles Wells at 2-3 ; Notice of Filing, Decl. of Edward Kirkland at 2.

Proposed District 21 includes parts of Hillsborough, Pinellas, and Manatee counties. Notice of Filing, Guthrie Decl. II, at 12 & n.8. Division of counties is consistent with the way in which Florida draws districts. In Florida's most recent redistricting plan (Plan 330), for example, 19 senate districts out of 40 contained parts of three or more counties. Notice of Filing, Guthrie Decl. II at Tab 4. Although compactness is not a criteria for drawing districts that Florida has regularly followed in the past 20 years, District 21 in Plan 386 is reasonably compact and far more compact than District 21 in Plan 330. *Id.* at 2. Compare J.S. App. E with J.S. App. D.

Plan 386 preserves the core of existing districts and minimizes disruption to the political process. Notice of Filing, Guthrie Decl. II, at 2, 6; Tr. 19, 23; Notice of Filing, Cochran Aff. at 6-9. Only six existing districts are modified by the plan, and only eight percent of the 2.9 million people who reside in the nine Tampa Bay area districts are placed in new districts by Plan 386. Notice of Filing, Guthrie Decl. II, at 6. Plan 386 does not require the State to hold out-of-cycle elections, *ibid.*, and it preserves the

political balance of the current districts, favoring neither Democrats nor Republicans. *Id.* at 10.

Appellant objected to proposed District 21, claiming that the decision to include parts of Manatee and Pinellas Counties in District 21 was racially motivated. In support of that contention, appellant relied primarily on statistics comparing the percentage of blacks in proposed District 21 to the percentage of blacks in Hillsborough, Pinellas, and Manatee Counties. Tr. 32-37; see also J.S. App. 22a-23a. Appellant declined to call any witnesses. Tr. 51-52. One other person objected to the plan, a former state senator who is not a party to the case. She offered no evidence to support her objection in addition to that offered by appellant. Tr. 53-56.

4. The district court entered an order approving the use of the new plan. J.S. App. 3a-18a. The court held that it was not required to find the original District 21 unconstitutional in order to approve the remedy proposed by the parties. Instead, the relevant inquiry was whether there was a bona fide dispute concerning the constitutionality of original District 21. *Id.* at 7a-8a. Applying the standard set forth by this Court in *Miller*, the district court concluded that there was a bona fide dispute over the constitutionality of original District 21, and that the State "acting through its lawfully empowered officials" could therefore agree to a new redistricting plan. J.S. App. 8a-13a.

The court then considered whether proposed District 21 would be constitutional. Applying the *Miller* standard, the court found it "obvious that a cognizable, constitutional objection to the proposed District 21 is not established." J.S. App. 15a. The court specifically found that "[i]n its shape and

composition, proposed District 21 is, all said and done, demonstrably benign and satisfactorily tidy, especially given the prevailing geography." *Ibid.* The court also found that "[b]oth common sense and the history of this litigation suggest that the residents of District 21 regard themselves as a community." *Ibid.* The court further found that "Plan 386 offers to any candidate, without regard to race, the opportunity to seek elective office." *Id.* at 17a. Based on those findings, the court concluded that "Plan 386 passes any pertinent test of constitutionality and fairness." *Ibid.*

Judge Tjoflat, in a special concurrence, agreed that the proposed plan is constitutional. J.S. App. 19a. He concluded, however, the proposed remedy could not be approved without a judicial determination that the original plan is unconstitutional. *Ibid.* Because he concluded that the evidence was sufficient to show that the original plan is unconstitutional, he agreed with the majority that the court could approve the proposed plan. *Ibid.*

ARGUMENT

The district court's decision is correct. The court's conclusion that Plan 386 is constitutional is based on an application of the correct legal standard, and the court's finding that race did not predominate in the formulation of District 21 is not clearly erroneous. The court's approval of the plan is also consistent with federalism and separation of powers principles. Because this case does not present any substantial unresolved legal issue, the Court should summarily affirm the judgment of the district court.

1. a. Appellant contends (J.S. 10-16) that the district court concluded that District 21 in Plan 386

is constitutional without applying the standard set forth by this Court in *Miller*. That contention is incorrect. The district court quoted at length from this Court's decision in *Miller*, including *Miller's* holding that strict scrutiny applies only when a plaintiff can show that "race was the predominant factor motivating the legislature's decision," *i.e.*, that the "legislature subordinated traditional race-neutral districting principles * * * to racial considerations." J.S. App. 12a (quoting *Miller*, 115 S. Ct. at 2488). Applying the *Miller* standard, the district court found that race did not predominate in the drawing of proposed District 21. The court specifically found that "[i]n its shape and composition, proposed District 21 is * * * demonstrably benign, and satisfactorily tidy, especially given the prevailing geography." J.S. App. 15a. The district court's conclusion that proposed District 21 is constitutional is therefore based on an application of the standard set forth in *Miller*.

b. Appellant contends (J.S. 21-24) that the evidence shows that race predominated in the drawing of District 21. The parties to the agreement submitted abundant evidence, however, that race did not predominate in drawing District 21. That evidence shows that District 21 complies with Florida's equal population and contiguity requirements, includes urban and poor residents with common concerns, is only 36% black in VAP, minimizes disruption, helps to retain the existing partisan balance, and does not deviate from any practice that Florida has traditionally followed. See pp. 4-6, *supra*. Given that evidence, appellant has fallen far short of showing that the district court's finding that race did not predominate in the drawing of District 21 is clearly erroneous.

See *Miller*, 115 S. Ct. at 2488 (indicating that if a district court applies the correct legal analysis, its finding on the issue of predominant motive is reviewed under the clearly erroneous standard).

Appellant argues that, because District 21 crosses Tampa Bay, it is bizarre in shape, noncontiguous, and noncompact. J.S. 22-24. But Florida has numerous bodies of water, and it is not unusual for districts to cross them. See J.S. App. 13a; Notice of Filing, Guthrie Decl. II, at 5-6. The Florida Supreme Court has recognized that districts sometimes cross bodies of water, and it has specifically held that such districts do not violate Florida's contiguity requirement. *In re Constitutionality of Senate Joint Resolution 2G*, 597 So.2d 276, 279 (Fla. 1992). The district court therefore reasonably concluded that District 21's crossing of Tampa Bay did not show that race predominated in the drawing of that district.

Appellant also contends that District 21's inclusion of parts of Hillsborough, Manatee, and Pinellas Counties is significant proof of a racial gerrymander. See J.S. 22-23. In Florida, however, districts are commonly drawn to include parts of counties. U.S. Response, Exh. 1, Decl. of John Guthrie (Guthrie Decl. I) at 6-7; U.S. Response, Exh. 10, Decl. of Richard Scher at 12, 16, 25. In Senate Plan 330, for example, 19 of the 40 senate districts covered parts of three or more counties. Notice of Filing, Guthrie Decl. II, at Tab 4. Moreover, the parts of the three counties included in District 21 are all in the Tampa Bay area. District 21's inclusion of parts of three counties is therefore not proof that race predominated over race-neutral districting practices.

Appellant also relies on statistics showing that the percentage of black voters in the proposed District 21

is higher than the percentage of black voters in Hillsborough, Manatee, and Pinellas Counties. Given existing patterns of racial segregation, and the likelihood that a poor urban district will also include many minority residents, however, it is not surprising that the percentage of blacks in District 21 is higher than the percentage of blacks in the three counties as a whole. District 21 includes a reasonably compact, politically cohesive community within the Tampa Bay area that is not constrained by political boundaries. There is nothing constitutionally suspect about drawing such a district. See *Miller*, 115 S. Ct. at 2490 (a State "is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests").

Finally, appellant asserts that there is no basis for the district court's finding that proposed District 21 includes a community of interest. J.S. 24. The parties to the agreement, however, submitted extensive evidence showing that the residents of proposed District 21 are mostly from poor, urban areas and that those residents share concerns about a wide range of issues. See pp. 4-5, *supra*. Appellant introduced no evidence to the contrary.

Thus, based on the evidence before it, the district court reasonably determined that District 21 was not predominantly motivated by racial considerations. Appellant's disagreement with the court's finding does not warrant this Court's plenary review.

2. Appellant argues for the first time on appeal that the district court's approval of the settlement plan "violated the separation of powers and federalism." J.S. App. 16a. According to appellant, instead of approving a plan devised through mediation, the

district court was required to declare the original plan unconstitutional and then allow the legislature to draw a new plan. Appellant, however, did not raise that contention below. It is therefore not properly presented here. *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976).

In any event, appellant's argument is without merit. The district court correctly determined that it was not required to find the previous plan unconstitutional as a predicate to adopting the new plan. This Court's decisions establish that federal courts ordinarily have authority to enter consent decrees to resolve federal claims without first making a formal adjudication of liability. *Rufo* v. *Inmates of the Suffolk County Jail*, 502 U.S. 367, 389 (1992); *Local Number 93, International Ass'n of Firefighters* v. *Cleveland*, 478 U.S. 501, 525 (1986); *United States* v. *Armour & Co.*, 402 U.S. 673, 681 (1971). To enter such a decree, a court need only satisfy itself that the decree serves to resolve a genuine dispute within the court's subject matter jurisdiction. *Local Number 93*, 478 U.S. at 525. As the district court concluded (J.S. App. 7a-13a), the agreement in this case served to resolve a bona fide dispute concerning the constitutionality of the original redistricting plan, and that dispute was within the court's subject matter jurisdiction.

Appellant did not consent to the decree, and a consent decree may not waive a nonconsenting party's right to claim that the relief provided by the decree is unconstitutional. *Local Number 93*, 478 U.S. at 529-530. But appellant was given a full and fair opportunity to show that the relief provided by the decree is unconstitutional. Having failed to make that showing, appellant had no right to block imple-

mentation of the decree simply because he would have preferred that the plan be devised through a different process. Appellant challenged old District 21 on the ground that it violated the Equal Protection Clause and sought as relief a plan that satisfied constitutional standards. The decree entered by the district court provides appellant all the relief he sought, and all the relief to which he is entitled.

The district court also did not violate federalism or separation of powers principles in approving the use of Plan 386. After learning that the state legislature would not convene a special session to draw a new plan, the court granted the request of counsel for the state Senate to allow the parties to engage in mediation to devise a constitutional plan. The Attorney General of the State, the Senate, the House, and the Secretary of State participated in drawing the plan and consented to the imposition of that plan as a remedy. The district court determined that the plan was "primarily a legislative action" and that it had the consent of all the necessary state officials. J.S. App. 16a. The plan remains in effect "unless and until the State of Florida adopts a new plan in accordance with federal and state law." Settlement Agreement at 4. The court's approval of the new plan was thus fully consistent with federalism and separation of powers principles.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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